Baharudeen Mohamed Yusoff Ghaney v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–471 OF 2010
KN SEGARA, AZHAR MA'AH AND LINTON ALBERT JJCA
3 APRIL 2012

Criminal Procedure — Mens rea — Trafficking in dangerous drugs — Whether facts of case showed accused had mens rea possession of drugs — Whether evidence led to irresistible inference accused brought drugs to Malaysia for delivery, supply or distribution

The appellant ('accused'), an Indian national, was convicted and sentenced to death by the High Court for trafficking in 10,527g of ketamine contrary to the Dangerous Drugs Act 1952. He appealed to the Court of Appeal against conviction and sentence solely on the ground he did not know that a bag ('P7') he collected from the carousel in the baggage claim area for arriving passengers at the Penang International Airport and which had a tag bearing his name, contained the drugs. When customs officers at the airport scanned and checked the bag they found it contained 31 tins labelled as sweets. However, the substance inside the tins when analysed was found to be ketamine. The accused claimed he was asked by a person in Chennai, India, to transport the 'sweets' to Malaysia and that that person had paid for his air fare and given him some pocket money. The accused said he came to Malaysia to look for work. In his cautioned statement the accused said although he had two keys to P7's lock he never opened the bag to check the contents. The High Court held there was no reason for the accused to have transported the sweets when it was cheaper to have them couriered. The court also found it difficult to believe the accused, being educated, did not bother to check the contents of the bag although it was wet from the leakage of the 'sweets' or that he did not feel suspicious about the errand he was asked to perform.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The accused's defence that he had been told the bag contained 'sweets' did not raise any doubts as to his knowledge of the drugs in the bag. This was exacerbated by his wilful blindness to ascertain for himself the contents of the bag. His custody and control of the bag was indisputable. The bag had a tag with his name on it and the accused personally retrieved the bag from the carousel at the airport's baggage claim area (see para 4).

(2) The accused's alleged purpose of coming to Malaysia to seek employment was not believable as he neither had a work permit nor a prospective job

offer in hand. He did not express a word in his cautioned statement that his trip to Malaysia was to seek employment. The irresistible inference was that his travel to Malaysia was to deliver/supply/distribute the drug in the bag to person/s known or unknown to him. There was no doubt the accused had mens rea possession of the drugs in the bag at all material times (see para 5).

(3) The trial judge had not misdirected himself either on the law or on the facts to occasion any miscarriage of justice warranting appellate intervention. The prosecution had proved its case beyond reasonable doubt. The accused had not raised any doubt either at the trial or in the appeal (see paras 3 & 21).

[Bahasa Malaysia summary

Perayu ('tertuduh'), warganegara India, disabitkan dan dihukum mati oleh Mahkamah Tinggi kerana mengedar dadah ketamine seberat 10,527g bertentangan Akta Dadah Berbahaya 1952. Dia merayu kepada Mahkamah Rayuan terhadap sabitan dan hukuman satu-satunya atas alasan yang dia tidak mengetahui bahawa beg ('P7') yang diambil daripada karusel di kawasan tuntutan beg untuk penumpang yang tiba di Lapangan Terbang Antarabangsa Pulau Pinang dan yang mana mempunyai tanda yang menunjukkan namanya, mengandungi dadah tersebut. Apabila pegawai kastam di lapangan terbang mengimbas dan memeriksa beg tersebut mereka mendapati ianya mengandungi 31 tin yang dilabelkan sebagai gula-gula. Walau bagaimanapun, bahan dalam tin-tin tersebut apabila dianalisa didapati ia adalah ketamine. Tertuduh mendakwa yang dia disuruh oleh seseorang di Chennai, India, untuk menghantar 'sweets' tersebut ke Malaysia dan orang tersebut telah membayar tambang kapal terbangnya dan memberikan dia sedikit duit poket. Tertuduh menyatakan yang dia datang ke Malaysia untuk mencari kerja. Dalam penyataan amarannya tertuduh menyatakan walaupun dia mempunyai dua kunci kepada kunci P7 tetapi dia tidak pernah membuka beg-beg tersebut untuk memeriksa kandungannya. Mahkamah Tinggi memutuskan tidak terdapat alasan untuk tertuduh menghantar gula-gula tersebut apabila ianya lebih murah untuk ianya dikurier. Mahkamah juga mendapati adalah susah untuk mempercayai tertuduh, berpelajaran, tidak kisah untuk memeriksa kandungan beg tersebut walaupun ia basah akibat kebocoran 'sweets' atau dia tidak berasa curiga mengenai suruhan yang diminta untuk dia melaksanakan.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Pembelaan tertuduh bahawa dia telah diberitahu yang beg tersebut mengandungi 'sweets' tidak membangkitkan apa-apa keraguan terhadap pengetahuannya mengenai dadah di dalam beg tersebut. Ini diburukkan lagi dengan kejahilan undang-undangnya untuk mempastikan dengan sendiri kandungan beg tersebut. Kawalan dan jagaan terhadap beg tersebut tidak dipertikaikan. Beg tersebut mempunyai tanda dengan

namanya di bahagian atas dan tertuduh dengan sendirinya mengambil beg tersebut daripada karusel di kawasan tuntutan beg lapangan terbang (lihat perenggan 4).

(2) Dakwaan tertuduh tujuan datang ke Malaysia untuk mencari pekerjaan tidak boleh dipercayai memandangkan dia tidak mempunyai permit kerja ataupun tawaran kerja dengannya. Dia tidak menyatakan langsung di dalam penyataan amarannya bahawa perjalanannya ke Malaysia adalah untuk mencari pekerjaan. Inferens yang tidak dapat dihalang adalah bahawa perjalanannya ke Malaysia adalah untuk menghantar/ membekalkan/ mengagihkan dadah dalam beg tersebut kepada orang/orang-orang yang dikenali atau tidak dikenalinya. Tidak terdapat keraguan tertuduh mempunyai milikan mens rea terhadap dadah dalam beg pada kesemua masa material (lihat perenggan 5).

(3) Hakim perbicaraan tidak tersalah arah dirinya sama ada dari segi undang-undang atau atas fakta untuk mencetuskan apa-apa ketidakadilan mewajarkan campur tangan mahkamah rayuan. Pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Tertuduh tidak membangkitkan apa-apa keraguan sama ada pada masa perbicaraan atau di dalam rayuan (lihat perenggan 3 & 21).]

Notes

For a case on trafficking in dangerous drugs, see 5(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 2764.

Cases referred to

Zulfiikar bin Mustaffah v PP [2001] 1 SLR 633, CA (folld)

Legislation referred to

Dangerous Drugs Act 1952 s 2, First Schedule

Appeal from: Criminal Trial No 45–17 of 2009 (High Court, Pulau Pinang)

Rajivan (A Ruebarkumar with him) (Sitham & Associates) for the appellant.
Siti Rafidah bt Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

KN Segara JCA (delivering judgment of the court):

[1] The appellant ('the accused') was charged, tried, convicted and sentenced to death for the offence of trafficking in ketamine, a dangerous drug under the Dangerous Drugs Act 1952 ('DDA 1952').

[2] The accused's appeal before us centered mainly on one issue, namely, that

he did not have any knowledge of the drugs in the bag ('P7'), at all material times, until its discovery by the customs officers at the Penang International Airport, after the said bag had gone through a scan and, thereafter, the bag was opened and its contents examined.

[3] We had no hesitation in dismissing the appeal. We found no merits in the appeal. We were satisfied the trial judge had carefully evaluated the evidence, both, at the close of the prosecution's case, and also at the conclusion of the trial after the accused had given sworn evidence in his defence. The trial judge had not misdirected himself, either on the law or on the facts, to occasion any miscarriage of justice, warranting appellate intervention.

[4] The trial judge was satisfied that the prosecution had proved its case beyond reasonable doubt. The accused's defence, that he had been told, by one Farouk in India, the bag contained 'sweets', did not raise any doubts as to the accused's knowledge of the drug in the bag. This was exacerbated by his willful blindness to ascertain for himself the contents of the bag. His custody and control of the bag was indisputable. The bag had carried a baggage tag (P7(3)) that bore the name of the accused attached to the handle of the bag in question. The accused had retrieved the said bag personally from the carousel in the baggage claim area of arriving passengers at the Penang Airport.

[5] The accused's alleged purpose of travel to Malaysia to seek employment is not believable as he neither had a work permit nor a prospective job offer in hand. A' fortiori, he did not express a word in his cautioned statement ('D17') that his trip to Malaysia was in fact to seek employment. The irresistible inference is that his travel to Malaysia from India was to deliver/supply/distribute the drug, in the bag, to person/s, known or unknown to him, in Malaysia. The said act of the accused, travelling from India to Malaysia, with the bag packed with the 31 tins containing the drug ketamine, in such large quantity, cleverly labeled in tins to deceive, conceal and pass off as 'sweets', falls squarely within the meaning of 'trafficking' under s 2 of the DDA 1952. There can be no doubt that the accused had mens rea possession of the drugs in the bag at all material times.

[6] Briefly, the case for the prosecution is as follows.

[7] On 14 January 2009 Customs Officer, Badrul Hisham ('PW4') was on shift duty from 3–11pm at the Unit Khas Pemeriksaan Penumpang (Passengers Division Unit) at the Penang Bayan Lepas International Airport. He was checking the luggage of disembarking passengers from Flight No SQ196 Singapore Silk Air, which had landed at about 5.10pm, prior to their exit from the building.

[8] PW4 was on duty with his colleagues Muzamzam Bakri and Mohamad Azrin ('PW5'). PW5 was in charge of the scanner machine. PW5 informed PW4 that he had scanned a bag and it reflected quite a dark image on the monitor that looked suspicious. PW5 could not ascertain what it was. PW5 requested PW4 to find out whether there were any prohibited goods or any dutiable goods inside the bag carried by the passenger.

[9] PW4 and Muzamzam then walked over to the scanner. PW4 met the accused. The accused acknowledged the bag in question was his. Muzamzam directed the accused to carry his bags to the luggage check counter. At that point of time, PW4 saw that there was a big grey bag and a small black bag. The accused lifted both the bags from the scanner and took them to the luggage counter to be checked.

[10] At the luggage check counter, PW4 ordered the accused to open his bags and, after the big bag (P7) was opened he saw tins inside it. He asked the accused 'What is it?' The accused answered 'Sweets'. PW4 directed the accused to open one tin as he saw that the bag was wet and thought that the sweets had melted. The tin that the accused opened was a blue tin with a plastic lid and the tin was wet. After the accused opened it, PW4 saw 'sweets' and 'balloons' coming out of the tin. PW4 directed the accused to put back the contents into the tin. PW4 called his supervisor Zam Zaimi ('PW9'), a senior customs officer, and related to him what had happened.

[11] PW9 was on duty as the supervisor in the passengers division unit at the Penang Bayan Lepas International Airport on 14 January 2009 overseeing his subordinate officers and watching the movements of disembarking passengers. He was doing shift duty in the 'Green Lane' from 3–11pm that day. He was about three to four meters away from the baggage claim carousel. There were not many people in the area. He saw the accused taking his luggage from the carousel. The accused then proceeded to the scanner. The accused was alone and there was no one with him. Shortly after that PW9 was called by PW4 and was referred the outcome of a check on a passenger's luggage. The owner of the luggage was the same Indian passenger PW9 had seen earlier at the carousel.

[12] PW9 told PW4 and Muzamzam to bring the accused and his luggage to the 100% Check Room. There were two bags — a big grayish green bag (P7) and a small black sling bag (P7A).

[13] In the 100% Check Room, PW9 asked the accused what was inside the big bag (P7). The accused answered there were a type of sweets. PW9 then directed the accused to take out all the 31 tins from P7 and asked him to open three tins, apart from the one tin that had been opened before PW4. After the three tins were opened, PW9 asked the accused to open one 'balloon'. He saw

a crystalline substance like sand. Apart from the 'balloon', there was sticky liquid and granules inside the tins. PW9 further testified that the bag (P7) was wet and when he touched the liquid smeared inside the bag, it was sticky.

[14] PW9 called a customs officer ('Rozali') on duty with him in the 'Green Lane' into the 100% Check Room to conduct test on the crystalline — like substance with test kits. The result of the tests showed that the substance was a type of drug. Following the result, PW9 obtained instructions from his branch head who directed him to get in touch with the Penang Customs Narcotics Unit. Eventually, PW9 handed over the accused and all the seized exhibits to the Customs Narcotics Unit when a team from the unit arrived at about 6pm.

[15] PW7, the officer from the Penang Chemistry Department testified that she had examined and analysed all the substances found inside the 'balloons' in the 29 tins and each of the plastic package in two tins labeled 'C10' and 'C18'. She found them to be clear crystalline substances. They were ketamine as listed in the First Schedule of the DDA 1952 and weighed 10,527g (see chemist report P14).

[16] The accused gave evidence on oath. There were no witnesses called by the accused in support of his defence. Nevertheless, he had introduced his cautioned statement as a defence exhibit, D17, in the course of the prosecution's case. The trial judge had carefully scrutinised this voluntary statement by the accused at the close of the prosecution's case, before calling upon him to enter his defence.

[17] Very briefly, the accused's defence was that a person from Chennai, India, called Farouk, had asked the accused to deliver some sweets to Malaysia. The accused had no knowledge of the bag (P7). He came to Malaysia to look for work. Farouk bought the flight ticket to Malaysia for the accused and gave some money to him. Farouk checked in the luggage at Chennai Airport in India. The accused only carried the sling bag (P7A) with him as cabin luggage. The accused said that he had never seen P7 nor even touched it before it was seized by the customs officers at the airport, Penang, on 14 January 2009. In short, the accused further contends that the bag (P7) was actually in the custody and control of the Indian and Singaporean Airlines, throughout, until its seizure by the customs officers in Penang. This ingenious contention, when considered in the context of D17, is most damning, and lends no credibility to accused's evidence. It must, *ipso facto*, seal the fate of the accused on the issue of the custody and control of the bag (P7), as well as on the issue of his knowledge of its contents, as he had clearly stated, inter alia, in D17:

> J16 … Farok beri saya wang RM3,000 dalam note RM50.00 untuk dibelanja di Malaysia. Duit upah saya sebanyak 10000 rupee akan diberikan kepada saya di Madras nanti selepas saya selesai serahkan barang di Malaysia.

S21 Apa barang yang kamu bawa dari India?

J21 Saya diberikan sebuah bag beroda berwarna kelabu oleh Farok di Madras. Farok kata didalam bag itu ada 'sweet' dan minta saya menaiki bas ke Kuala Lumpur. Kepada siapa nak diberikan bag ini akan diberitahu kemudian oleh Farok.

S22 Bagaimana keadaan bag yang kamu bawa dari Madras?

J22 Bag beroda besar bewarna kelabu dan berkunci dengan mangga kecil. Kunci mangga sebanyak 2 ada pada saya diberikan oleh Farok kepada saya.

S23 Bila tarikh Farok berikan bag beroda itu kepada kamu?

J23 Pada 13.01.2009 Farok berikan kepada saya dalam perjalanan ke Airport Madras.

S26 Selepas kamu menerima bag beroda daripada Farok pada 13.01.2009, adakah kamu ada membuka bag beroda ini?

J26 Tidak. Farok ada berpesan kat saya supaya saya tidak membuka bag itu.

[18] We find no reason to disagree with the trial judge's findings in his judgment as follows:

> Hence having regard to his educational background, it is hard to believe that the accused did not know at all about the drugs inside the 31 tins that he was carrying in the grayish green bag (P7). As an educated man, why was the need for him to carry 31 tins of 'sweets' all the way from India to Malaysia for somebody called Farouk back home. Besides, Farouk could have done it himself. Why did not Farouk carry it out himself? If really sweets, Farouk himself could have also sent them by courier which could be very much cheaper than using the service of the accused which the former had to pay for all his expenses in flying to Malaysia. The flight fares alone would have cost Farouk a substantial sum of money. The accused himself, a mathematician ought to be aware of this fact.
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> Therefore the suspicion of the accused as a highly educated, reasonable and sane man ought to have been aroused about the very true purpose of the transaction. In the true sense of the word he was not a country bumpkin from a village in Chennai, India and prior to this trip, he had in fact even been to Malaysia before.
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> The only reasonable conclusion for the court to draw is that in reality, the accused knew what he was doing and was fully aware of the presence of the drugs in all the 31 tins. Besides, the prosecution had adduced evidence that P7 belonged to the accused because the baggage tag bore the name of the accused attached to the handle of the bag in question.

[19] Again we are in complete agreement with the trial judge that the conduct of the accused displayed nothing short of willful blindness towards the contents of the 31 tins inside P7. He also correctly relied on the Singapore Court of Appeal case *Zulfiikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633, although there are our own reported cases on the same issue. It was held in that case:

> It is thus not enough for an accused merely to assert absence of knowledge. The facts of the case must be examined as a whole to see whether he had good reason to suspect that he was carrying drugs … In short, ignorance is a defence only when there is no reason for suspicion and no right and opportunity of examination; ignorance simpliciter is not enough.

[20] The trial judge in the present appeal before us stated as follows:

> As admitted by himself he had two keys to the padlock and if he had wanted he could have opened P7 to ascertain what was inside it yet he chose not to do so. Even though the 31 tins were sealed with metal lids, the liquid that was smeared on the two cardboards and some parts of the bag would have made him smell a rat. It must be remembered that the accused claimed that Farouk accompanied him until the New Delhi Airport and did not follow him throughout the entire flight to Malaysia. He was not with the accused all the time.
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> The conduct of the accused as narrated by his own evidence displayed nothing short of willful blindness towards the contents inside the 31 tins inside P7.

[21] We are unanimous the appeal be dismissed. The trial judge had found that the prosecution had proved its case beyond a reasonable doubt. The accused had not succeeded in raising any doubt at the trial in the High Court, or in this appeal before us.

[22] Appeal dismissed. Conviction and sentence of death affirmed.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar